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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 251 (AKH)

5 CHARLIE JAVICE and OLIVIER
6 AMAR,

7 Defendants.

Conference

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8 New York, N.Y.
9 November 2, 2023
2:30 p.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13
14 APPEARANCES

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Southern District of New York

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(Case called; appearances noted)

THE COURT: Mr. Spiro, it's your motion, why don't you take the podium and deliver your remarks.

MR. SPIRO: Thank you, your Honor. It's a bit of a history that brings us here today to this motion to compel. It has to do with what the government has represented that they would do to this Court and to the defense, what they're required to do, what they ought to do and they haven't done it.

THE COURT: Why don't we cut to the chase. Tell me exactly what you want. I'm having a little trouble finding out exactly what you want.

MR. SPIRO: What we want is what we've been saying, and I think what the Court's been saying all along, which is that we need to have the information necessary to have a fair trial.

THE COURT: What specifically?

MR. SPIRO: The custodial mailboxes that they actually have. And I think that this is a point that your Honor should know cause I don't want it to be lost in translation.

THE COURT: I'd like to see what specifically you want.

MR. SPIRO: Sure. Why don't I put some examples up on the screen.

THE COURT: You have in your brief a list.

MR. SPIRO: So I think this will be actually helpful.

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1 THE COURT: On page 11 of your memorandum you have
2 four categories of information. Is that what you want?

3 MR. SPIRO: Yes, we want all of those documents and
4 materials that are always kept frankly by a bank and secured by
5 a bank.

6 THE COURT: Are these the four things you want?

7 MR. SPIRO: Yes, so long as they are from all of the
8 custodians at issue, yes.

9 THE COURT: So you want these four categories with all
10 the custodians. Which specific custodians do you want to have?

11 MR. SPIRO: We sent a list to the government. We've
12 attached it to our memo. We can provide it to the Court. But
13 if I could put it up on the screen, I think it would be very
14 clear to the Court the basis for this. To make a long story
15 short, they have already -- and this is the point that I want
16 to make sure is very clear to the Court. They've already
17 secured all of this information. This have this. They're just
18 not giving it to us. So the bank -- you can tell from the
19 metadata that we have --

20 THE COURT: We can't deal with words like "this" and
21 "that." If you want to make a motion for specific documents, I
22 want to know what specific categories. I want a list of them.
23 Where do I find that list?

24 MR. SPIRO: So I think the reason that I'm speaking in
25 those sorts of terms are because there was a breakdown earlier

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1 on in a way that happened --

2 THE COURT: Mr. Spiro, you're a fantastic lawyer. You
3 know what I mean. Do you have a list?

4 MR. SPIRO: Yes, we're going to go to the next slide.

5 THE COURT: Tell me your list.

6 MR. SPIRO: Okay.

7 THE COURT: Is page 11 your list?

8 MR. SPIRO: Well, these are the vast majority or the
9 essentially the list, your Honor. The reason that we put -- if
10 I could get two more phrases out here. The reason that I'm
11 caveating it is because, because the government has not
12 explained why they searched which custodians or what their
13 search terms are, yet they have all this information, I'm left
14 a bit to guess at all of the stuff they're not turning over.
15 What I want is --

16 THE COURT: You're saying that the government has
17 materials in its possession and has not turned it over to you?

18 MR. SPIRO: What I'm saying is that as you can tell
19 from the productions that they've given us, they have held
20 mailboxes of custodians in this case that the JPMorgan bank
21 maintained. And then they would meet with the witness, if we
22 could go to the next slide, please.

23 THE COURT: Why don't you answer my question before we
24 go to slides. When I get a motion to compel, I usually have a
25 list of things they want compelled.

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1 MR. SPIRO: I get that. I filed such motions to
2 compels with various specific lists.

3 THE COURT: Why don't I have it now?

4 MR. SPIRO: The reason is -- and this is the chicken
5 and the egg problem, which is that they are not even giving us,
6 which you would normally have in a case, which is, This is what
7 we have. This is what we're withholding. This is why. This
8 is the example that I think will prove the point.

9 This is Ben Vinzant. As you can see from the email on
10 the right, he met with the government. JPMorgan hand-selected
11 documents that they wanted the government to see, the same
12 JPMorgan that sued my client. JPMorgan then tells the
13 government, we don't want Mr. Vinzant meeting with Mr. Spiro
14 and his people. We only want him meeting with you. Okay. This
15 is an obvious witness of the government. They didn't turn over
16 his email in-box, his custodian records, his emails, his
17 documents. Nothing. They intentionally did that.

18 THE COURT: Stop. Stop. Stop. What specifically did
19 they not do?

20 MR. SPIRO: He is not a custodian. They did not take
21 --

22 THE COURT: They didn't search his records?

23 MR. SPIRO: Correct.

24 THE COURT: And you want them to search his records?

25 MR. SPIRO: Like they've done in every other case I've

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1 ever handled in this courthouse.

2 THE COURT: Just yes or no.

3 MR. SPIRO: Yes.

4 THE COURT: You want them to search his records?

5 MR. SPIRO: Yes.

6 THE COURT: Why?

7 MR. SPIRO: Because you can't take a witness and just
8 cherrypick like this; and say, hand over which documents are --

9 THE COURT: What do you mean cherrypick? If he's a
10 witness, and there are *Giglio* documents to give, you generally
11 get them at the pretrial conference before the final pretrial
12 conference.

13 MR. SPIRO: That's the point, your Honor, which is why
14 this case is so different. That's not what happened here.
15 Instead, JPMorgan curated a list --

16 THE COURT: I don't know what that means. They
17 curated a list.

18 MR. SPIRO: They gave the government a hand-selected
19 series of documents. They did not take his email in-box and
20 search it. They just got handed what JPMorgan said you should
21 have for this witness and asked no questions. What I'm
22 suggesting --

23 THE COURT: Why do they need to do more?

24 MR. SPIRO: Why do they need to do more?

25 THE COURT: Why do they need to do more?

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1 MR. SPIRO: Because you can't allow a party to simply
2 cherrypick documents and say give us those --

3 THE COURT: What does mean cherrypick documents?
4 Every time I've been involved in any discovery program criminal
5 or civil, you ask for specific documents. You say I want
6 documents that conform to these and these criteria, and
7 documents are turned over.

8 MR. SPIRO: Correct, and I agree with your Honor
9 exactly on that point, and that's exactly what did not happen
10 here. So now this is where we're at the discovery phase --

11 THE COURT: So you're saying the government did not
12 get all the documents that Ben Vinzant has?

13 MR. SPIRO: Correct, and they conceded as much.

14 THE COURT: If they don't have it, they can't give it
15 to you.

16 MR. SPIRO: They do have it, that's the point. They
17 just decided not to list him as a custodian. So they said,
18 hey, he's not a custodian. He doesn't matter if he has
19 exculpatory information.

20 THE COURT: Excuse me. Are you saying the government
21 has this information in its possession?

22 MR. SPIRO: In its control, absolutely.

23 THE COURT: In its possession?

24 MR. SPIRO: Again, your Honor, I have an email here --

25 THE COURT: Just told me yes or no, Mr. Spiro.

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1 MR. SPIRO: I'm not in their office, your Honor.

2 THE COURT: You don't know if they have it.

3 MR. SPIRO: I know that it's in their control.

4 THE COURT: What you mean is, you know the government
5 can get it.

6 MR. SPIRO: I don't want to --

7 THE COURT: That's what control means. They can get
8 it.

9 MR. SPIRO: They can get it and he was sitting in this
10 office and they're emailing about it and they have some of his
11 documents and I know that his custodian account is secured.

12 THE COURT: What do you mean secured?

13 MR. SPIRO: Meaning you can tell in this matter from
14 the metadata which in-boxes are maintained so that they're easy
15 to search. So just like your Honor just said what would happen
16 in normal cases, I would say, obviously this is a relevant
17 custodian. You're meeting with him. You're interviewing him.
18 He's providing information to the government.

19 THE COURT: When you prepare a case, you meet with a
20 lot of people, and then you decide who's relevant and who's
21 not.

22 MR. SPIRO: Well, if we go to the next slide, we will
23 see --

24 THE COURT: The government doesn't have to turn over
25 all of its investigatory material.

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1 MR. SPIRO: Well, they have to turn over all --

2 THE COURT: Stay with Ben Vinzant.

3 MR. SPIRO: Okay. These custodians that I'm talking
4 about -- so I get your Honor's point. What if you met with a
5 witness in this hypothetical that did not have relevant
6 information for the case. But here's what's difference again
7 about this case that is also different from every other case I
8 would imagine in 25 years that's appeared before your Honor.
9 They actually quote from these people in their criminal
10 complaint in the indictment. The custodians we're asking for
11 are in the indictment. And they're telling us, Oh, well, we
12 can quote from one email in the indictment, but we don't have
13 to look at the rest of their emails. I never heard of that
14 happening.

15 THE COURT: I have the superseding indictment. Tell
16 me where.

17 MR. SPIRO: I put it up on the screen, your Honor,
18 just so it's easy to find.

19 THE COURT: I'm looking at the superseding indictment
20 complaint.

21 MR. SPIRO: The complaint. This is the complaint,
22 your Honor.

23 THE COURT: The complaint.

24 MR. SPIRO: And I put it up on the screen.

25 THE COURT: See if you can get the complaint. I see

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1 it. Are you saying that Ben Vinzant is the marketing executive?

2 MR. SPIRO: No, just to show the complaint. This is
3 Mark Goldstein.

4 THE COURT: We were talking about Ben Vinzant.

5 MR. SPIRO: Correct, the Court did ask a question.
6 The question was in essence --

7 THE COURT: Where in the indictment -- you're
8 referring to the complaint. Where in the complaint is there
9 mention of Ben Vinzant?

10 MR. SPIRO: I don't see him mentioned by name in the
11 complaint, but there are certain people that are mentioned
12 specifically by name.

13 THE COURT: We were talking about Ben Vinzant. Do you
14 want to drop Ben Vinzant?

15 MR. SPIRO: No, but I think that this proves the point
16 frankly.

17 THE COURT: Mr. Spiro, I have your motion. I want to
18 decide your motion one way or the other. Don't slip from point
19 to point. Take it one point at a time. Back to Vinzant. Why
20 should the government ask Ben Vinzant or JPMorgan for more
21 documents?

22 MR. SPIRO: For the very reason that, again, they have
23 served a subpoena, a broad subpoena. JPMorgan is under a DPA.

24 THE COURT: That DPA has nothing to do with this case.

25 MR. SPIRO: That is correct, and that's why at first

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1 blush you feel that the DPA shouldn't have anything to do with
2 this case. But actually on a closer read, it has anything to
3 do with this case. Because the DPA is written in a way that
4 the United States government, the department of justice and all
5 of its arms and branches on any matter, not just on the matter
6 regarding the original misconduct of JPMorgan, on any matter
7 must comply with any request of the U.S. Attorney's office at
8 issue. So that DPA is just as strong as the DPA in *Stein*.

9 THE COURT: Let's look at the DPA.

10 MR. SPIRO: Sure. I believe it's paragraph six.

11 THE COURT: I'm looking at it in your affidavit.

12 MR. SPIRO: Paragraph five. I misspoke.

13 THE COURT: It's a long document, and there's a lot of
14 paragraph fives.

15 MR. SPIRO: Paragraph five, page nine is written
16 specifically as the department of justice does when an entity
17 is required to cooperate in all investigations, not just one
18 specific U.S. Attorney's office, and not just on one specific
19 subject matter.

20 THE COURT: I'm having trouble finding it.

21 MR. SPIRO: I can pass up a copy.

22 THE COURT: I have it. I read it this morning. Just
23 give me one moment. It's exhibit E to your papers?

24 MR. SPIRO: Correct. If you look at the second half
25 of paragraph five, Shall also cooperate fully with other

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1 domestic or foreign law enforcement and regulatory authorities.

2 THE COURT: I'm having some difficulties. Just a
3 minute.

4 MR. BUCKLEY: Page nine of the DPA, your Honor.

5 THE COURT: Okay. I'm with you. Go ahead. All
6 matters relating to the conduct described in this agreement,
7 any attach statement of facts.

8 MR. SPIRO: And other conduct.

9 THE COURT: By the fraud section and the office until
10 the later of the date upon which all investigations and
11 prosecutions arising out of such conduct. This has nothing to
12 do with what we're here for.

13 MR. SPIRO: I agree with the Court.

14 THE COURT: In another court, in another matter,
15 having to do with commodities trading, and not what we're here
16 for.

17 MR. SPIRO: I agree with your Honor, other than in so
18 far as any U.S. Attorney's office can request documents from
19 them and they must comply.

20 THE COURT: Let's forget about the DPA. I hold that
21 the DPA has nothing to do with this case. Unlike the DPA in
22 Judge Kaplan's case, *United States v. Stein*, which is directly
23 related between an employer and an employee in a litigation, a
24 criminal litigation against the employee.

25 MR. SPIRO: So back to the Ben Vinzant question. So

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1 again, just so that the facts are clear before the Court and
2 I've articulated them hopefully well. He's meeting with the
3 U.S. Attorney's office. They are providing a select set. They
4 meaning the bank, the bank that has control over his in-box
5 that is sharing with the U.S. Attorney's office whatever it
6 chooses. The same bank that has the motivation that has
7 civilly sued my client and has reputational and other
8 incentives here, not just some everyday victim, not just some
9 run of the mill case. They cherrypick, hand-select, whatever
10 word you want to use. They do not tell us what search terms
11 they used, what they provided. Did they provide inculpatory
12 and exculpatory. No. They just hand over whatever they choose
13 from the email in-box.

14 All we're saying is, do what you do in every other
15 case I've ever heard of in this district. Which is, take the
16 email in-box, tell us what search terms you used, take our
17 search terms and turn over anything relevant and material like
18 you're required to under Rule 16. What is so controversial or
19 unusual about that? That's what's done in every case. And
20 the reason that I pivoted, your Honor, to the fact that they
21 didn't even search custodians that are referenced in the
22 accusatory instruments is because I never heard of that before.
23 I cannot imagine there's a case that's been in front of your
24 Honor in 25 years like that, where they're quoting emails
25 inside of the accusatory instrument, and they didn't search the

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1 email in-box; or don't have to turn over anything from the
2 email in-box to us in the ordinary course in criminal
3 discovery. That's not how it works.

4 THE COURT: I can't deal with these generalities.
5 Mr. McLeod, you want to respond to Ben Vinzant?

6 MS. McLEOD: Yes, your Honor. So I think first of all
7 I want to make clear that there is a difference between
8 evidence that the government has in its possession and the
9 question of what a custodian is or an in-box. To the extent
10 that we have emails related to Ben Vinzant in our possession,
11 those have been turned over. Mr. Spiro is using the word
12 "they" very liberally. He keep saying "they" searched for
13 this. "They" know that.

14 THE COURT: I know.

15 MS. McLEOD: And they --

16 THE COURT: So I'll put the question that Mr. Spiro
17 doesn't clear up. What obligation does the government have to
18 ask Ben Vinzant or his employer for more documents?
19 Ms. McLeod, the question is to you.

20 MS. McLEOD: Oh, I'm sorry. I thought that was for
21 Mr. Spiro. The government does not have such an obligation.
22 The government has deemed and believes JPMorgan Chase to have
23 responded appropriately to the grand jury subpoena. And the
24 attempt by the defendants to seek essentially everything they
25 want through the grand jury subpoena power runs contrary to

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1 law, to practice, and to the federal rules; which in this case
2 provide a specific means by which defendants can seek
3 information that they need. And that's Rule 17, which is
4 something --

5 THE COURT: I'm not sure Rule 17 helps them neither.

6 MS. McLEOD: I think it may not.

7 THE COURT: That's a different issue. I'm only asking
8 what you are required to do. And you're saying that you have
9 no requirement to get anymore documents than you have already?

10 MS. McLEOD: Correct.

11 THE COURT: So I'll ask you this question, Do you have
12 a best efforts kind of obligation as Judge Kaplan seem to
13 suggest in *Stein*?

14 MS. McLEOD: Certainly not under the facts of this
15 case. I think as your Honor noted, *Stein* was a very specific
16 case where there was a very clear connection between the
17 government and the party with the DPA. And there was a very
18 broadly worded DPA that required the entity to cooperate with
19 that specific prosecution of that specific criminal defendant
20 which I think --

21 THE COURT: I agree with that reading.

22 MS. McLEOD: So, no. The answer is no.

23 THE COURT: I'll put to you this, Mr. Spiro. Is there
24 anything specifically that you would like the government to get
25 from Vinzant?

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1 MR. SPIRO: Yes. I would like them to take his
2 custodial mailbox which JPMorgan has indicated --

3 THE COURT: What's a custodial mailbox?

4 MR. SPIRO: His email account, his Outlook account and
5 his folders. And I would like them to run a few targeted
6 search terms in the time period in question that they already
7 have documents from so that we make sure that we run a fair
8 trial and a fair process and that we have anything that's
9 exculpatory from his mailbox. Again, it doesn't seem like a
10 particularly controversial request to me, and one that I know
11 has been granted because I've asked many government lawyers
12 before and they've done it every time. So that's the request.
13 It's a simple one. The U.S. Attorney's office and JPMorgan
14 have near limitless resources. It would take one day. That's
15 all I'm asking for.

16 THE COURT: Finish?

17 MR. SPIRO: Yes.

18 THE COURT: Your request is denied. Rule 16 requires
19 in subparagraph (A)(E) an obligation to produce documents if
20 the item is within the government's possession, custody or
21 control; and the item is material to preparing the defense; or
22 the government intends to use the item in its case in chief at
23 trial; or the item was obtained from or belongs to the
24 defendant.

25 Well, the item doesn't belong to the defendant. The

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1 government, I understand from Ms. McLeod, does not intend to
2 use what you're looking for in its case in chief at trial. And
3 the broad outline of what you want is not an item that can be
4 said to be material to preparing the defense, rather it's a
5 broad discovery issue suitable for a civil case and not a
6 criminal case. Next point.

7 MR. SPIRO: After your Honor makes sort of categorical
8 rulings, I will move on to other topics.

9 THE COURT: Of course. That's what you should do.

10 MR. SPIRO: So I'm going to go to a different category
11 which is the Ben Vincents of the world that are actually in the
12 complaint that are used as the basis by which the government
13 claim --

14 THE COURT: There's no Ben Vincents in the world.
15 There are specific individuals in the world, which might or
16 might not be relevant here. Which specific individual are you
17 interested in?

18 MR. SPIRO: Mark Goldstein.

19 THE COURT: All right. He was a director of
20 acquisition marketing strategy at JPMorgan Chase.

21 MR. SPIRO: And he was used amongst these other roles
22 that clearly have relevant material to this case.

23 THE COURT: And he is the marketing executive that is
24 mentioned in the complaint. I don't know what paragraph
25 number.

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1 MR. SPIRO: And not only that, but they're referencing
2 his emails in the complaint by which they claim to have
3 probable cause in this matter. And all I'm simply saying is,
4 once you do that, you have an obligation -- it's not just Rule
5 16. It's not just the Court's inherent authority. It's not
6 their good faith best efforts and their *Brady* and ethical
7 obligations. They have an actual obligation to not just
8 cherry-pick certain emails and have an obligation to do a good
9 faith production.

10 THE COURT: What paragraph number is it in the
11 complaint?

12 MR. SPIRO: I'm checking that, your Honor.

13 THE COURT: Is it 32?

14 MR. SPIRO: Yes, your Honor.

15 THE COURT: Is Mark Goldstein the marketing executive?
16 Is that a reference for a marketing executive? There's no
17 reference to Goldstein.

18 MR. SPIRO: Yes, your Honor. You're asking me? Yes,
19 it is.

20 THE COURT: What is it that you didn't get? Did you
21 get something from Mark Goldstein?

22 MR. SPIRO: We don't believe we've gotten anything.
23 He's told to us by the government to not be a custodian,
24 meaning they did not search his records, his file, his
25 anything.

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1 THE COURT: So, Ms. McLeod, isn't this something that
2 you're going to prove?

3 MS. McLEOD: Yes, your Honor. And just to clarify,
4 this email has been produced to the defendants. Mr. Spiro is
5 talking about email in-boxes that JPMorgan Chase has that the
6 government does not have in its possession. This is an email
7 that is with Mr. Amar. The entirety of Amar's in-box for the
8 relevant time period has been produced, so they have this
9 email. Any emails that we have with Mr. Goldstein have been
10 produced.

11 THE COURT: So I gather that your request, Mr. Spiro,
12 is the same as for the previous one, that is to do a search of
13 the mailbox?

14 MR. SPIRO: I don't want that request to seem as broad
15 as the Court in its framing. It's just a very narrow time
16 period with very narrow to and from and a few search terms.

17 THE COURT: What is it you want?

18 MR. SPIRO: I'm asking for an order of this Court that
19 the government meet in good faith to take terms and time
20 periods, and we can come back to the Court within a week with
21 an agreement as to what we can agree on.

22 THE COURT: You're not telling me what you want.

23 MR. SPIRO: I want the same. They have listed
24 custodians. I'm asking for this custodian to be added to the
25 custodian list that they're dealing with everybody else's in

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1 this case. That's all I'm asking for.

2 THE COURT: The government willing to do that,
3 Ms. McLeod?

4 MS. McLEOD: Your Honor, we've already attempted to
5 confer on this. I don't think it would be productive.

6 THE COURT: The answer is yes or no.

7 MS. McLEOD: No, your Honor.

8 THE COURT: Why should they do it, Mr. Spiro?

9 MR. SPIRO: Well, you know, I could keep going through
10 Rule 16, the Court's plenary power, *Brady*, ethics, the right
11 way to do this; but it's really ultimately don't we want this
12 to happen the right way, don't we want the truth to come out in
13 this courtroom.

14 THE COURT: Why should they do it? Why are they
15 required to do it?

16 MR. SPIRO: Because once they decide to take a piece
17 of evidence and put it forward, then the other emails around
18 that time period, around that subject matter are clearly
19 material, relevant information under Rule 16. They are in
20 their possession.

21 THE COURT: The date is January 10, 2022.

22 MR. SPIRO: It starts January 6, but goes to January
23 10.

24 THE COURT: So January 6 to 10, and in reference to a
25 January 18 and then a January 21. I think, Ms. McLeod, you

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1 should ask JPMorgan Chase to give you something more than is
2 identified here. I would have trouble articulating how much
3 more, but enough to give all the circumstances and the email
4 interchanges on the subject.

5 MS. McLEOD: Your Honor, I know that your Honor is
6 trying not to get -- is trying to move this case forward and is
7 attempting to do that expeditiously. I think the government
8 wants to do the same, but these emails, if we have them, they
9 have them. And the concern that the government has is that --

10 THE COURT: I miss that. If you have them --

11 MS. McLEOD: If we have them, they have them.

12 THE COURT: I'm asking for something a little broader
13 than that.

14 MS. McLEOD: I know that. And what I'm saying is
15 that, there has never been a time in this case when the
16 defendants have not moved the goalpost again. It would set,
17 frankly, an extraordinary precedent for us to be required to
18 enforce a grand jury subpoena in a way that the defendants are
19 requesting. Because in that case, the defendants could do that
20 in any case for any grand jury subpoena simply because it's
21 useful to them.

22 But being useful or something that they want is not
23 how the grand jury power works, and they should not be allowed
24 to use the grand jury power, which is very different, to avoid
25 having to comply with Rule 17 which is the method that they

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1 have in their possession. And if in fact they have all of
2 these specific things that they can set forth to your Honor as
3 to why they think these are relevant material and specific, it
4 seems like that would be a basis for a Rule 17 subpoena
5 application, which they have not made.

6 So I think what's inexplicable here is that they are
7 trying to go through the government to use the very broad
8 powers of the government's investigative subpoenas to get
9 something which by their own proffer they claim could meet the
10 requirements of Rule 17. That is the proper way to do that. I
11 know that, your Honor, Rule 17 subpoenas are applied for
12 everyday in this district and before your Honor. This
13 particular ask to enforce the grand jury subpoena in a way the
14 defendants want is something that has never been granted.

15 MR. SPIRO: Your Honor, may I respond?

16 THE COURT: Give me a moment. You're saying that the
17 January 10 email has been produced, right, Ms. McLeod?

18 MS. McLEOD: Yes.

19 THE COURT: And the January 18 email has been
20 produced?

21 MS. McLEOD: Yes.

22 THE COURT: And the January 21 has been produced?

23 MS. McLEOD: That's right, your Honor.

24 THE COURT: And the January 24th has been produced?

25 MS. McLEOD: Yes, your Honor.

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1 THE COURT: Three emails have been produced in
2 isolation, or has the entire chain, if there was a chain, of
3 emails was produced in each date?

4 MS. McLEOD: Usually they're produced as a chain, but
5 I would have to look specifically as to this one. But the
6 reference to the chain here indicates to me that it was likely
7 produced as part of an email chain.

8 MR. SPIRO: I would like to correct that. These
9 emails reference other emails and other related emails that
10 have not been turned over.

11 THE COURT: I will rule that all documents referenced
12 in these emails or other parts of a chain of emails of which
13 these are parts should be requested from JPMorgan Chase and
14 then turned over. And if JPMorgan Chase declines to do so,
15 Mr. Spiro can then proceed and I'll consider any motions to
16 squash a Rule 17 subpoena. I think because of the complexities
17 of this case, I would be sympathetic to the service of a
18 subpoena and my resolution of the issues at this time in
19 discovery rather than at the eve of trial.

20 MR. SPIRO: Thank you, your Honor.

21 MS. McLEOD: Your Honor, if I could just -- sort of
22 the issue with that is that JPMorgan Chase does not have the
23 ability to decline because they are compelled by the
24 government's grand jury power. So it's not possible --

25 THE COURT: I don't know if it has to under those

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1 grand jury subpoenas.

2 MS. McLEOD: I think based on what you're saying here,
3 it could be covered under the subpoenas, and so they are not
4 able to decline. It wouldn't be a voluntary request.

5 THE COURT: I guess the request ought to be to review
6 your files and make sure that there has been a full production
7 with regard to these particular emails, and in particular all
8 parts of the chain of which they may be a part and of all
9 documents to which references have been made.

10 MR. SPIRO: Your Honor, may I briefly add --

11 THE COURT: One minute, Mr. Spiro.

12 MS. McLEOD: Your Honor, we can check with JPMorgan
13 Chase to make sure that there is nothing missing from those
14 chains and that it was a complete production of those emails.

15 THE COURT: Fine. That resolves that issue.

16 MR. SPIRO: Your Honor, can I just be heard briefly on
17 that issue cause as I understood it, your Honor was about to
18 give directive to the U.S. Attorney's Office. I heard a
19 directive to the U.S. Attorney's office that was a bit broader
20 than the way it's just been said again. And Ms. McLeod
21 sometimes argues --

22 THE COURT: What is it that you want, Mr. Spiro?

23 MR. SPIRO: The same thing that your Honor already
24 said. And I think this whole grand jury subpoena red herring
25 is throwing this all off.

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1 THE COURT: I'll do this again. The government is to
2 request JPMorgan Chase to review its files and to assure that
3 all parts of the chain of which these emails were a part, I'm
4 referring to the specific emails I mentioned, have been
5 produced; and that all the documents to which references have
6 been made in these emails, and in the emails in the chain, are
7 also produced. That's as far as I'm going, Mr. Spiro.

8 MR. SPIRO: And just to be clear about that -- and
9 that sounds closer than what I understood your Honor's
10 directive to be.

11 THE COURT: Mr. Spiro, that's as far as I'm going.

12 MR. SPIRO: Since we're doing this in buckets, your
13 Honor, that that is the ruling as to other individuals who are
14 referenced in the complaint?

15 THE COURT: No.

16 MR. SPIRO: You want to go one by one through those?

17 THE COURT: Yes.

18 MR. SPIRO: Okay. Before we do that just then, I
19 won't keep regurgitating argument, but I do want to say a
20 couple of things, because I think Ms. McLeod is speaking
21 perhaps unintentionally. This has nothing to do with, frankly,
22 the way your Honor is analyzing it with this grand jury
23 subpoena. Your Honor could have said, Listen, they're under an
24 omnibus grand jury subpoena. You requested it. You have, as
25 your Honor once put it in this very case, control compulsion

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1 over them. They're compelled to do it. You control it.
2 Produce all of it. Your Honor could have ruled that way. You
3 didn't. You were off that grand jury subpoena issue. That's
4 the way I would have urged your Honor to rule, but here we are.

5 At this point, Rule 16 contemplates your Honor's
6 ability to order anything that's just under the circumstances.
7 Your plenary authority gives you the ability to order anything
8 just under the circumstances. So Ms. McLeod constantly saying
9 that this is new law in the grand jury context is nonsensical.
10 The other thing is that the reason that we haven't turn to 17C
11 at various points, one being they haven't even finished
12 production yet. The other being every time that issue has come
13 up before the Court, the Court has urged the government to do
14 the right thing in essence. And the government has each and
15 every time said basically don't worry. 17C is not necessary.
16 We're going to do it. And if you look at the transcripts in
17 front of your Honor that are on the screen, they've said that
18 every time.

19 THE COURT: I think we should go ahead the way I want
20 to go ahead. I don't have plenary power. District judges don't
21 have plenary power. We're guided by Rule 16, and in some cases
22 where there is an outstanding subpoena, Rule 17. Let's proceed
23 to the next person.

24 MR. SPIRO: Here's another missing custodian, another
25 person referenced in the complaint. This time an executive of

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1 JPMorgan.

2 THE COURT: What paragraph number is this?

3 MR. SPIRO: Paragraph 19A. Your Honor, I would make
4 the same application based on many of the same arguments that
5 I've made already. The application again is for the custodian
6 in-box to be searched the way every other custodian was
7 searched in this case. An in-box that is maintained and just
8 sitting there, your Honor, that is in their control. And if
9 your Honor is not inclined to do that, which we think the Court
10 should under these circumstances, 16(d)(2)(A) allows a Court to
11 enter an order that is just under the circumstances. We're
12 asking for an order of all communications in and around the
13 communications that they think are important enough to quote in
14 their accusatory instrument be turned over to the offense.
15 They're obviously relevant material and in their control.

16 THE COURT: 15A has to do with depositions.

17 MR. SPIRO: Under Rule 16.

18 THE COURT: You quoted Rule 15. I heard you say Rule
19 15. Was I mistaken?

20 MR. SPIRO: No, Rule 16, your Honor.

21 THE COURT: 16 has to do with -- the cite is 16(a)(2)?

22 MR. SPIRO: I'm pulling it up. I'm going to try to
23 put it on the screen.

24 THE COURT: No, I have a book.

25 MR. BUCKLEY: 16(d)(2)(A), your Honor.

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1 THE COURT: We're not dealing with this. The parties
2 fails to comply with this rule, This is Rule 16, the Court may
3 order the party to permit the discovery or inspection specified
4 time, place and manner and prescribe other just terms and
5 conditions or grant the continuance or prohibit the parties
6 from introducing the undisclosed evidence, or enter any other
7 order that is just under the circumstances. We're not there
8 yet. Why are we dealing with that?

9 MR. SPIRO: It's just circular, your Honor. If your
10 Honor thinks there's something that they should turn over,
11 that's the provision that a district court can use, to say you
12 should turn over additional documents.

13 THE COURT: No. We're dealing with it in the first
14 instance that the government have an obligation to produce
15 anymore than it has produced. So complaint paragraph 19 deals
16 with oral statements.

17 MR. SPIRO: If you look at B, your Honor, it's email,
18 JPMorgan Chase executives's email, and there are a series of
19 emails.

20 THE COURT: The management presentation accompanied by
21 a 60-page power point deck. Is that what we're talking about?

22 MR. SPIRO: Yes, your Honor, and it's clear from the
23 context --

24 THE COURT: Did the government produce that power
25 point deck?

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1 MR. SPIRO: The power point we have. What we don't
2 have is the emails from the executives of JPMorgan around the
3 same time, which you can tell from the circumstances in other
4 families of related emails, talking about discussing and
5 putting into context what they cherry-picked into their
6 complaint. And so all we're saying is, they should produce
7 these. They have them.

8 THE COURT: You want me to ask the government, to
9 order the government to what? Order them to do what?

10 MR. SPIRO: The original request -- and the request
11 that I'm not obviously withdrawing in any way, shape or form,
12 is that they take this custodian who obviously is relevant
13 enough --

14 THE COURT: What custodian?

15 MR. SPIRO: Khary Barnes, the JPMorgan executive
16 that's on this email chain. They have his in-box. They have
17 it preserved.

18 THE COURT: I don't see his name here.

19 MR. SPIRO: At the top of the screen.

20 THE COURT: I'm talking about the complaint.

21 MR. SPIRO: They are just sanitizing the complaint to
22 not include his name. We have the email.

23 THE COURT: Where is it referred to?

24 MR. SPIRO: It just says on or about July 2, 2021,
25 Javice email to JPMorgan Chase executives. We have the email.

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1 THE COURT: On or about July 7, 2021, Javice presented
2 to JPMorgan Chase, is that the paragraph?

3 MR. SPIRO: I'm talking about 19B.

4 THE COURT: B as in boy?

5 MR. SPIRO: B as in boy, yes, your Honor.

6 THE COURT: On or about July 2, 2021, is that the
7 paragraph?

8 MR. SPIRO: Yes, your Honor.

9 THE COURT: It doesn't talk about Khary Barnes.

10 MR. SPIRO: No, your Honor. The complaint in many
11 places is sanitized by not including their actual names. But
12 if you cross-reference it to the email --

13 THE COURT: The name is there, Javice.

14 MR. SPIRO: Javice is the defendant, so they're not
15 sanitizing Javice. But when it says Javice email, JPM, the
16 person that she is emailing is the person I'm identifying.
17 They just sanitized it.

18 THE COURT: He's the recipient?

19 MR. SPIRO: Correct.

20 THE COURT: The answer is no. There's nothing about
21 this that has anything to do with anything that would be
22 required by Rule 16. You're looking for discovery.

23 MR. BUCKLEY: Your Honor, this is Sean Buckley on
24 behalf of Mr. Amar. May I just interject?

25 THE COURT: You may.

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1 MR. BUCKLEY: Thank you, Judge. I think the issue
2 here at least from our perspective is that it is broader than
3 these individual email accounts. What has occurred here is the
4 government issued a very broad grand jury subpoena that
5 captured any communication imaginable related to the
6 transaction, related to my client, related to Ms. Javice. What
7 happened subsequent to the issuance of that subpoena is that,
8 the government in coordination with JPMorgan narrowed the scope
9 of that request. Our position is that they improperly
10 narrowed.

11 THE COURT: Do you know how it narrowed?

12 MR. BUCKLEY: We do not, your Honor. We have asked
13 for that and have not been provided that information.

14 THE COURT: Shouldn't they have that information,
15 Ms. McLeod? Shouldn't they know if the subpoena has been
16 narrowed?

17 MS. McLEOD: Your Honor, we produced to them our grand
18 jury subpoena request. The answer is no. I think that's
19 essentially what they're asking for in their Rule 17
20 application for the communications.

21 THE COURT: No, I don't mean the communications. At
22 some point the government says, I'll be satisfied if you
23 produce this and this. It's usually a document that clarifies
24 what was requested in the first instance.

25 MS. McLEOD: I don't think we ever had a conversation

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1 where we said, if you produce X. That's it. I think we, as is
2 common in any sort of major large scale white collar cases --

3 THE COURT: You negotiate the practical application.

4 MS. McLEOD: Right. We set priorities for what we
5 would like first.

6 THE COURT: I don't believe the government is required
7 to produce that, Mr. Buckley.

8 MR. BUCKLEY: Your Honor, the reason that I raise that
9 is because what we are seeking here and what we believe that
10 the government is obligated to seek goes beyond just complying
11 with its *Giglio* obligations. And this is something that your
12 Honor noted at Mr. Amar's initial appearance about the fact
13 that other communications that are not relied upon in the
14 complaint, nevertheless may be material to the presentation of
15 the defense and the preparation of the defense. Specifically
16 here communications between and among JPMorgan personnel
17 discussing the acquisition and the post-acquisition behavior,
18 their reliance upon statements made by the defendants here --

19 THE COURT: That's one of the four paragraphs on page
20 11.

21 MR. BUCKLEY: That's correct, your Honor.

22 THE COURT: That's the internal JPMorgan Chase
23 communications.

24 MR. BUCKLEY: Correct, your Honor. And what has
25 occurred here at least from what we are able to tell from

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1 discovery is that they have been selected, but a full
2 comprehensive search has not been done. For example, going
3 back to the email referencing Mr. Amar, CC-1, that you and
4 Mr. Spiro were discussing a moment ago, that's an email that
5 contains only a portion of the relevant communications.
6 There's nothing in there about what that executive then went on
7 and said to others about what Mr. Amar represented; what he
8 replied upon, whether any of the representations, either
9 pre-acquisition or post-acquisition were material. And that's
10 the type of information as your Honor noted in July is directly
11 relevant. And similarly --

12 THE COURT: In a civil case you get it, but in a
13 criminal case it's beyond Rule 16.

14 MR. BUCKLEY: Well, the point, Judge, is that we don't
15 believe it is beyond Rule 16 because of the initial subpoena
16 that was issued. Those materials are in the control of the
17 government, maybe not the government's physical custody, but
18 they are in the control of the government. And permitting it
19 to proceed in this way where it is essentially farming out its
20 investigative obligations to determine both the good and the
21 bad to a private entity is permitting it to duck its ethical
22 obligations here. And it will leave us no choice -- and this
23 is something I believe Mr. Spiro was also alluding to -- it has
24 been raised at each conference to date the possibility or the
25 specter of a Rule 17C subpoena.

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1 And the government's opposition here now takes that on
2 directly, and we're going to be left with no resort except to
3 seek Rule 17C subpoenas for this information that is --

4 THE COURT: Mr. Buckley, I never interfere with how a
5 defendant wants to try to prove its case or prepare its case.
6 You do what you think you want to do, and I'll rule on it. The
7 government says it has produced all its documents required to
8 be produced in response to each of these four categories.

9 MR. BUCKLEY: They have produced all of the documents
10 in their physical possession.

11 THE COURT: Now the question is, therefore, whether
12 they should ask for JPMorgan Chase for more. That point is
13 your point, and it's Mr. Spiros's point. And the only case
14 that you cite is *United States v. Stein*. That's Judge Kaplan's
15 case, 488 F. Supp 2d, 350. Judge Kaplan ruled in a particular
16 relationship where there was criminal suit brought against one
17 of the former employees of an accounting firm. And the
18 accounting firm had entered into a deferred prosecution
19 agreement where it was obligated to produce all documents that
20 the government required to be produced or asked to be produced.
21 But there was a relationship involved in that case where it
22 doesn't -- where there's not in this case.

23 What you're asking for, Mr. Buckley, is discovery.
24 It's not documents that are admissible. It's not in the terms
25 of Rule 16, documents that the government is required to

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1 produce. It's not material in preparing your defense because
2 you don't know what's going to come out of it. You don't know
3 what the government has or could get. You know what the
4 government has because they produced it, but you don't know
5 what JPMorgan Chase has or doesn't have. Presumably JPMorgan
6 Chase has produced in good faith in response to the
7 government's subpoena. You have no reason to quarrel with
8 that. You're wanting more, and I don't think you're entitled
9 to more. Specific instances, you may affect my decision, but
10 in general that's my ruling.

11 MR. SPIRO: Yes, your Honor. Some of this I think --
12 and it's well treaded in the history of this case. This
13 deference to JPMorgan both on the part of the government and
14 here, it can only concern us because the reality is as the
15 Court might remember, JPMorgan Chase sued our clients.

16 THE COURT: I know there's an SEC lawsuit against your
17 client, and there is a JPMorgan Chase case against your client,
18 and there's a criminal case against your client. I know all
19 about that.

20 MR. SPIRO: And there's no reason to think that
21 JPMorgan is some calling balls and strikes recipient of this
22 subpoena. In fact, there's reason to think the opposite when
23 the privilege log, just as another example, the way to test
24 this.

25 THE COURT: I don't want to go all over the place. You

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1 want to challenge the privilege log, I'll hear you on it. But
2 let's get off the generalities. We've finished with Khary
3 Barnes. Who's next?

4 MR. SPIRO: Let me ask this question given evolving
5 with the Court's remarks and maintaining our position. My
6 colleague read a quote of your Honor's, and your Honor
7 remembers it and sees it in the writing. Judge Liman had a
8 similar quote in the SEC matter. The government themselves has
9 their subpoena. If we give the Court a 17C subpoena for all of
10 this information that we've been discussing, is that the
11 simplest way for us to proceed at this point?

12 THE COURT: I don't give advice anymore. I gave that
13 up 25 years ago. Now I just make mistakes.

14 MR. SPIRO: I don't think so, your Honor. Is a way
15 to -- and again, this has come up. I'm not treading new ground
16 here either. This has come up at every court appearance.

17 THE COURT: I'm not telling you what I will rule on a
18 Rule 17C subpoena. If you issue a subpoena, do I have to sign
19 one or do you just issue it?

20 MR. SPIRO: I think you have to sign it.

21 THE COURT: I have to sign it. So if you give me a
22 subpoena, maybe the government won't object. If they object, I
23 have to rule. If they don't object, Chase could object by a
24 motion to quash. I'm not making any advance rulings.

25 MR. SPIRO: I was going to literally hand up. I've

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1 been trying to get this information I've got in every other
2 criminal case I've ever handled.

3 THE COURT: I doubt it.

4 MR. SPIRO: I was going to hand up a 17C subpoena and
5 ask you to sign it, your Honor.

6 THE COURT: I doubt it. You ever do it by motion,
7 don't you?

8 MR. SPIRO: No. In fact, I don't know that the
9 government has any basis to object. I guess some other person
10 could move to quash.

11 THE COURT: What's the rule, Ms. McLeod?

12 MS. McLEOD: So I myself have seen it perceived
13 differently. Typically the defendants try to attempt to make
14 some sort of a showing under *Nixon* to satisfy the Court who's
15 the ultimate sort of gatekeeper on Rule 17.

16 THE COURT: You briefed the issue.

17 MR. BUCKLEY: Yes, your Honor. We've briefed the
18 issue.

19 THE COURT: Both of you briefed the issue. Let me read
20 the rule.

21 MR. BUCKLEY: It's Rule 17C, your Honor. But the
22 defense -- the rule itself does not provide a mechanism. It
23 does not state that it need be done pursuant to a motion. The
24 rule only states that a motion to quash for unreasonable or
25 unduly burdensomeness could be granted.

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1 Now in practice many courts have required a formal
2 motion from the defendants. We disagree with Ms. McLeod's
3 representation that we must comply with the *Nixon* standard.

4 THE COURT: Let's read the Rule 17A.

5 MR. BUCKLEY: 17C.

6 THE COURT: 17A, a subpoena must state etc., etc.,
7 etc, The second sentence, The clerk must issue a blank
8 subpoena, sign and sealed to the party requesting it, and that
9 party must fill in the blanks before the subpoena is served. It
10 doesn't say anything about the Court.

11 MR. BUCKLEY: We're happy to proceed that way, your
12 Honor.

13 THE COURT: I never looked into this. I don't know,
14 but I think the clerk signs it, you can serve it. And it's up
15 to JPMorgan Chase to react I guess.

16 MR. BUCKLEY: Understood, your Honor.

17 THE COURT: If the government objects to that, they
18 should let me know.

19 MS. McLEOD: I agree with Mr. Buckley. I think some
20 courts in this district do prefer to have a motion, but I also
21 agree that the rule does not specify as to how it must proceed.
22 I think it's out of an abundance of caution sometimes that
23 defendants go through the Court first --

24 THE COURT: Because it saves time.

25 MS. McLEOD: -- rather than brief it on the back end.

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1 THE COURT: It saves time.

2 MS. McLEOD: It's really up to the defendants.

3 THE COURT: It saves time. In *Stein* Judge Kaplan took
4 it up in the context as is here, Rule 16 and Rule 17 motion.
5 And then he had the subpoena served or he just asked the
6 respondent if it would move to quash. And when they moved to
7 quash, he decided all aspects together. It's probably the
8 better procedure. But Mr. Spiro, Mr. Buckley, you want to
9 serve a subpoena, follow Rule 17A and 17C, they should do what
10 they want. I follow the rules best I can.

11 MR. SPIRO: Thank you, Judge.

12 MR. BUCKLEY: Thank you, Judge.

13 MR. SPIRO: Your Honor, I would like to discuss one
14 other custodian. And before I do it as we pull it up, the
15 issue of the privilege log came up previously, your Honor.
16 Just so the Court is aware, we made the point that the
17 privilege log that was produced by JPMorgan had some -- this is
18 it. I don't know you can see it on my table, but it's
19 thousands and thousands of rows.

20 And the main point we were making was, one, to
21 elucidate to your Honor that what's going on here is not
22 everyday. And that the government did not object to a single
23 designation or redaction within all of these documents. Again,
24 never seen it before. Your Honor had suggested that there
25 would be some sampling that your Honor could look at, which is

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1 how most cases proceed, or at least there's some objection.
2 And the point that I wanted to make regarding the privilege
3 logs is, it shows the closest coordination. It shows what's
4 really going on here. So now that I've put that on the record,
5 if we could go back to the missing custodians. This is
6 Mr. Shpiro, who is discussed in the complaint, who's referenced
7 as again --

8 THE COURT: What paragraph number?

9 MR. SPIRO: It's criminal complaint 19E. So again
10 important and materially enough to put in the complaint to form
11 the basis of probable cause, the JPMorgan employee wrote in an
12 email -- so we know that this person has emails obviously.
13 They're talking about the deal. They're talking about what's
14 relevant. The government concedes as much. It's in their
15 complaint. We don't have the rest of the underlying
16 communications regarding this even precise fact.

17 So again, all that they're doing, this all exists,
18 right, in a computer system. JPMorgan has the person's email
19 custodian mailbox, and it just takes one click of a button and
20 it moves from this word "possession," which has taken on
21 extreme meaning here today. That's what we're taking about.
22 It's just that simple. So they say to JPMorgan in essence,
23 whether they say it directly or it's JPMorgan doing the
24 cherry-picking or whatever is going on behind closed doors, the
25 reality is they're basically saying, no, no, no, just give us

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1 the one really bad email and don't give us anything else. And
2 That's not the way this Court should proceed and that's not the
3 way this case should proceed.

4 MS. McLEOD: Your Honor, I think I have a fairly
5 simple answer to this one.

6 THE COURT: Go ahead.

7 MS. McLEOD: Again, to the extent that there are
8 emails quoted in the complaint, the defendants have those.
9 Those have been produced. Mr. Shpiro we were told by JPMorgan
10 Chase left JPMorgan Chase before the litigation hold went into
11 place. So they do not actually have his in-box because he left
12 prior to the hold, prior to the preservation of all the
13 in-boxes to the extent it was done. So it's not even in
14 JPMorgan Chase's possession.

15 MR. BUCKLEY: The bank is a regulated entity, your
16 Honor. I'm not sure even if the absence of a litigation hold
17 how emails of the bank --

18 THE COURT: If you're using company emails, he has no
19 right to -- the emails still exist.

20 MS. McLEOD: We were informed by JPMorgan Chase that
21 they did not have his in-box. We can confirm.

22 THE COURT: If this is part of a chain or refers to
23 other documents, those documents in that chain have to be
24 produced.

25 MS. McLEOD: Yes, your Honor.

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1 MR. SPIRO: May I have moment to confer with my
2 colleagues, your Honor?

3 THE COURT: Yes.

4 (Counsel conferred)

5 THE COURT: You want to use the jury room?

6 MR. SPIRO: No, your Honor. We're quick talkers.
7 Your Honor, given the Court's comments today, but I'm given
8 comfort by the Court's earlier comments on internal JPMorgan
9 communications. I'm given comfort by Judge Liman's comments.
10 I'm given comfort by the breadth of the government's own
11 subpoena, we're going to issue a Rule 17C subpoena today for
12 everything that we ought to get, and hopefully we get it and we
13 can have a fair process and a fair trial here.

14 MR. BUCKLEY: Just one amendment to that. It may not
15 be today just so that we can confer with one another.

16 THE COURT: I thought it was a rhetorical today.

17 MR. BUCKLEY: Understood.

18 THE COURT: Anything else you want me to do either
19 side?

20 MS. McLEOD: Yes, your Honor.

21 THE COURT: I should mention this on the record.
22 Mr. Spiro's and Mr. Buckley's time to reply was tomorrow or
23 Monday, and we called to see if they wanted us to postpone
24 today's conference until after they had a chance to reply, or
25 they preferred us to make the rulings today, and they would

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1 raise any points that they wanted to make in the reply briefs
2 into the oral discussion. So I've held today's conference as
3 scheduled, and I made my rulings. But if there's something I
4 missed or you miss saying, Mr. Spiro, I don't want to cut you
5 off.

6 MR. SPIRO: No, your Honor. And I very much
7 appreciate those remarks. I don't feel that I have anything
8 further to add now, again, given the Court's comments. I stand
9 by what I said and what we wrote. And I think that --

10 THE COURT: I'm not giving you all that you want. You
11 have the record. You did what you did, and I made my rulings.

12 MR. SPIRO: Yes, your Honor. Only thing the defense
13 would ask --

14 THE COURT: You're not giving in to me. You're
15 standing your position.

16 MR. SPIRO: Correct. The only thing I would ask is
17 that your Honor issue the order. And perhaps when the Court
18 sees what falls and shakes out of the trees after this order,
19 your Honor might see what I'm talking about.

20 THE COURT: Provides it's a fruit I enjoy eating. Is
21 there anything else? You started to say something Ms. McLeod.

22 MS. McLEOD: Yes, your Honor. Your Honor had
23 indicated at the August conference that at this conference we
24 would set a motion schedule and a trial date, and that we would
25 also set a date by which the defendants should provide notice

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1 of any advice of counsel defense. And so we're prepared to do
2 that. I know your Honor has a busy calendar.

3 THE COURT: Let's talk about one thing at a time.

4 MR. BUCKLEY: Your Honor, on behalf of Mr. Amar, we
5 would submit that it's premature to set any of those dates,
6 particularly in view of the fact that you've now authorized us
7 to issue a 17C subpoena.

8 THE COURT: I didn't authorize you to do anything.
9 You do anything you want. I think it's appropriate. What are
10 the three things? Advice of counsel. What was the second
11 thing you said?

12 MS. McLEOD: Trial date.

13 THE COURT: Yeah.

14 MS. McLEOD: And motion schedule.

15 THE COURT: Have you finished production except the
16 two things you have to do.

17 MS. McLEOD: Everything in our possession has gone
18 out.

19 MR. SPIRO: If it's gone out, we don't have it yet,
20 your Honor. We don't have it ingested yet, so we're not in a
21 position to answer.

22 THE COURT: When will you be ready for a motion
23 schedule, Mr. Spiro?

24 MR. SPIRO: The moment that the ingestion period is
25 done and we have all the documents that we actually have --

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1 THE COURT: A date? Don't assume that the 17C is out.

2 MR. BUCKLEY: I'm sorry, Judge.

3 THE COURT: I said don't assume that you're getting
4 the 17C subpoena. I don't want to wait.

5 MR. SPIRO: No, your Honor. I'm just talking about
6 getting --

7 THE COURT: How about scheduling a conference first
8 half of January.

9 MR. SPIRO: That's fine, your Honor.

10 THE COURT: And then we'll set dates at that time.

11 MR. SPIRO: That sounds like an appropriate schedule,
12 your Honor.

13 MR. BUCKLEY: I agree, your Honor.

14 MS. McLEOD: As long as there's a firm commitment from
15 the parties that we are ready to set a trial date.

16 THE COURT: They're not going to give you any
17 commitment. The only commitment you're interested in is me.

18 MS. McLEOD: I'm certainly interested in that. I
19 think, from the government's perspective, there's a concern
20 that the dates are going to start filling up in everyone's
21 calendar. There's a lot of trial counsel sitting in this room.

22 THE COURT: Let's do this. It seems to me at our next
23 meeting defendants should be required to state if they're going
24 to rely on an advice of counsel defense. What else is required
25 in relationship to that, Ms. McLeod, just the notice?

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1 MS. McLEOD: As well as the bases and any documents.

2 THE COURT: What's the rule?

3 MS. McLEOD: There's no rule in the rule of criminal
4 procedure as to advice of counsel.

5 THE COURT: But in defense there is a rule that
6 defenses have to be identified.

7 MR. SPIRO: I don't believe that there is, your Honor.
8 And again, we would ask to set that after we have the discovery
9 we've been trying to get for the entire year that the
10 government has constantly either been wrong about or
11 misrepresented to this Court. So we still don't have it, and
12 all I'm asking for is one court appearance where the defendant
13 gets a chance to actually look at the minimal discovery we're
14 getting about the relevant issues as far as I'm concerned, and
15 then give the Court --

16 THE COURT: I think I can expect it in first half of
17 January. You would know by then whether you're going to have
18 it or not.

19 MR. BUCKLEY: Your Honor, if I could just clarify
20 too --

21 THE COURT: If you have it, you notice it and you
22 withdraw it. You could do that.

23 MR. BUCKLEY: Part of the issues, Judge, as Mr. Spiro
24 indicated before, the privilege logs occupying those three
25 enormous binders on his desk, that is going to be a subject of

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1 litigation between the defense and JPMorgan. And until we have
2 visibility into those documents, because JPMorgan maintained
3 all of the Frank correspondence between and among the
4 defendants, but also between and among their attorneys. It is
5 impossible for the defense to assess at this juncture -- and I
6 don't believe it will be possible to do so in the first half of
7 January -- whether to take the drastic step of asserting an
8 advice of counsel defense that has broad implications as far as
9 privilege waiver, and can even constitute subject matter
10 waiver.

11 With respect to whether it is an affirmative defense
12 that is required to be disclosed under the Rule 16, it is not,
13 your Honor. It is not one of the enumerated affirmative
14 defenses that Rule 16 requires advance notice of. Now, of
15 course, we recognize that as a matter of efficiency we should
16 give advance disclosure, such that if there is going to be
17 litigation over the scope and nature of the waiver, were we to
18 assert it, it should be noticed in advance of trial. But
19 respectfully, Judge, I think it would be premature to require
20 us to give that notice.

21 THE COURT: At what point would it be reasonable?

22 MR. SPIRO: The moment that we are done with the
23 reviewing of the privilege information or the information that
24 JPMorgan purports to be privilege, that they're already walking
25 back on mind you, and the Rule 16 disclosure is complete, we

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1 will then have a chance to assess, like we do in every case,
2 the state of affairs, and we will promptly give notice.

3 MS. McLEOD: Your Honor, if I could just be heard on
4 this briefly. I think as your Honor pointed out correctly at
5 the last conference, advice of counsel is a subjective defense
6 about what the defendants believed at the time. That
7 information is already within the defendant's possession.
8 There is no need to await the indefinite end of possibly
9 protracted privilege litigation in order to provide notice to
10 the government, and then potentially kickoff another round of
11 discovery about privilege. The concern I think the government
12 has is that the defendants have frankly been dragging their
13 feet on setting any sort of deadline of any type in this case.
14 And at this rate, this case will never be tried.

15 THE COURT: When would you think you want to try it?

16 MS. McLEOD: When would we like to try the case, your
17 Honor?

18 THE COURT: Yes.

19 MS. McLEOD: First I'll give you a quick estimate of
20 the case in chief.

21 THE COURT: Just tell me when.

22 MS. McLEOD: I think the best option is fall of 2024,
23 given your Honor's schedule and what we understand at least
24 Mr. Buckley's trial schedule to be.

25 THE COURT: We'll set a trial date say November 4,

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1 2024. We can certainly finish everything before then, and that
2 will give us an opportunity to get a schedule in.

3 MS. McLEOD: Approximately four weeks for the
4 government's case in chief, your Honor.

5 THE COURT: Off the record.

6 (Discussion held off the record)

7 THE COURT: On the record. We'll set an October 28,
8 2024 trial date.

9 MR. BUCKLEY: Your Honor, could I request that we
10 still have a conference in earlier or mid-January as the Court
11 originally suggested.

12 THE COURT: Yes, I want to work backwards.

13 MR. BUCKLEY: Just because, while I understand
14 Ms. McLeod said that we've been dragging our feet, the simple
15 fact is --

16 THE COURT: Nobody's been dragging their feet.
17 Everybody works hard. Final pretrial conference will be on
18 October 15, at 11:00. Look at the rules of what we need at
19 that time. But briefly, it's jury instructions, post-jury
20 instructions, your briefs. I'll be dealing with all motions *in*
21 *limine* at that time. Everything that we need to do to prepare
22 for trial, joint pretrial order, that sort of thing. And you
23 schedule what's appropriate leading up to that, as long as you
24 give me three or more days to be able to digest the materials,
25 probably a week. What do we want to accomplish at the next

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1 conference?

2 MR. BUCKLEY: Two things, your Honor. One, assuming
3 we're able to digest the discovery produced to date, set
4 pretrial motions that are separate and apart from *in limine*
5 motions. I expect that those are likely to be substantial from
6 what we've seen thus far.

7 THE COURT: What's the nature of them?

8 MR. BUCKLEY: We're still assessing the discovery,
9 your Honor.

10 THE COURT: Generally speaking, you're not going to be
11 bound by this.

12 MR. BUCKLEY: Motions challenging the face of the
13 indictment, motions potentially to suppress. There were search
14 warrants at issue here. There are issues with regard to
15 questions surrounding statements made by the defendants. So
16 are just a general flavor. I expect we'll be in a position to
17 provide more detail and set a schedule in January.

18 The other reason that we would request the January
19 date though is, while we appreciate your Honor's consideration
20 in setting it in the Fall of 2024, depending on the volume of
21 discovery and where things stand, we may have to ask the Court
22 to adjust that date.

23 THE COURT: Which date?

24 MR. BUCKLEY: The October 28, trial date.

25 THE COURT: I don't like to set dates that are

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1 changeable.

2 MR. SPIRO: Same, here, your Honor. I would just
3 simply say until we get the Rule 16 discovery, which I can tell
4 the Court we certainly have not been dragging our feet on.
5 It's impossible for the defense to know.

6 THE COURT: How much time do you need to respond to my
7 order, Ms. McLeod, for discovery.

8 MS. McLEOD: As to the following up on the email
9 chains?

10 THE COURT: A week?

11 MS. McLEOD: Two weeks.

12 THE COURT: Two weeks. Can you respond to my order of
13 production by November 17, 2023. Are you folks planning to
14 issue a Rule 17C subpoena?

15 MR. SPIRO: We are, your Honor.

16 THE COURT: If you are doing it, do it quickly because
17 I'm now going to set a date for resolving any issues brought on
18 by motion to quash. How long does a party have to bring a
19 motion to quash?

20 MR. BUCKLEY: It's not specified by the rules, your
21 Honor. But I think typically it's within a reasonable period
22 of time which is what the rule says which is construed as 14
23 days.

24 THE COURT: Why don't you order production by December
25 1.

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1 MR. SPIRO: Yes, your Honor.

2

3 THE COURT: Why don't you put into the Rule 17C
4 subpoena -- I don't know if it's appropriate or not, but
5 something to the effect that any motion to quash should be made
6 by December 1.

7 MR. SPIRO: Yes, Judge.

8 THE COURT: That means I can hold a status conference,
9 let's say January 17.

10 MR. SPIRO: Yes, your Honor, at 11.

11 THE COURT: At 11. And I'll rule on the Rule 17
12 subpoena, unless I do it before then. We will set a motion
13 schedule at that time, and I'll require on that date any
14 defenses that will be expected, any affirmative defenses to be
15 noticed. Okay. You look quizzical, Mr. Spiro.

16 MR. SPIRO: I'm --

17 MR. BUCKLEY: I apologize. I missed that last
18 statement.

19 THE COURT: Any notices of affirmative defenses should
20 be stated, the notice should be stated by that status
21 conference of January 17.

22 MR. BUCKLEY: Just to be clear, that does not include
23 advice of counsel?

24 THE COURT: Yes, it does. It's an affirmative
25 defense.

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1 MR. SPIRO: Your Honor, respectfully I will --

2 THE COURT: Give me a date.

3 MR. SPIRO: On January 17, once we've reviewed the
4 discovery and the privilege logs that have been overly redacted
5 which we were supposed to address a month ago, I will be able
6 to give a date. But until I do that, it's impossible.

7 THE COURT: Can I not rule on something that's open?

8 MR. SPIRO: Well, no. I don't know. If your Honor
9 would recall, we were here to challenge the privileged logs a
10 month ago, and the same thing happened that has happened a few
11 times --

12 THE COURT: Why don't you ask in your Rule 17 subpoena
13 to produce the documents claimed to be privileged, or go
14 over -- if you could tell from a privilege log some documents
15 that you believe clearly are not privileged, call for those
16 documents.

17 MR. SPIRO: Understood, your Honor. We will and then
18 we will --

19 THE COURT: And that way there'll be a motion to
20 quash, and that will set up a ruling.

21 MR. SPIRO: Yes, your Honor. And by doing that and by
22 litigating that issue and getting the actual discovery, we'll
23 be in a position then immediately, again upon ruling those
24 things, to give the Court an answer to its question.

25 But I can't just pick a date in a vacuum that's nearly

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1 a year before the actual trial date to just say, for sure on
2 such a date I'll be in a position because I'm relying on other
3 individuals. I'm ruling on the Rule 16 production.

4 THE COURT: Look forward to my requirement in the
5 first half of February.

6 MR. SPIRO: Thank you, your Honor.

7 THE COURT: We'll set a motion schedule in January at
8 the conference. What am I missing, Ms. McLeod?

9 MS. McLEOD: Your Honor, the government would move to
10 exclude time between today and October 28, 2024, so that the
11 parties can file any pretrial motions, the defendants can
12 continue to review discovery and the parties can prepare for
13 trial.

14 THE COURT: Mr. Spiro.

15 MR. SPIRO: Yes. As I have said previously and
16 because of the delay tactics of the prosecutors in producing
17 documents, I'm not going to consent to that. And your Honor
18 every time has found good cause to grant such a request.

19 THE COURT: Suppose we grant a request until January
20 17. Defense, you consent?

21 MR. SPIRO: No, your Honor. As I said a moment ago,
22 we haven't consented because of the same sorts of arguments and
23 comments I've made throughout this process, but I understand
24 that the Court has each and every time found good cause.

25 THE COURT: No, I'm going to do something else. The

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1 trial will begin January 16.

2 MR. SPIRO: Then, your Honor, we will consent. If the
3 Court is going to force me to go to trial before I have the
4 discovery, then we will consent.

5 THE COURT: Mr. Buckley?

6 MR. BUCKLEY: No objection, your Honor.

7 THE COURT: Without objection, time is excluded until
8 January 17, 2024. Anything else, folks?

9 MS. McLEOD: No. Thank you, your Honor.

10 THE COURT: Whatever holidays come up before then,
11 happy holidays.

12 (Adjourned)